(19)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.,

Petitioner,

v.

HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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MOTION OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Petroleum Marketers Association of America ("PMAA") respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the brief filed by Texaco in this case, No. 87-2048. The consent of the attorney for petitioner has been obtained, however, counsel for the respondents refused to consent to the PMAA's filing of a brief *amicus curiae*.[1]

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[1] This Court previously granted a motion by the PMAA to file an *amicus* brief in support of Texaco's petition for certiorari, over respondents' objection.

The applicant, PMAA, is a federation of 43 State and regional trade associations representing over ten thousand petroleum marketers. Together, PMAA members market approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products and chain retailers that market motor fuels through service station outlets. The overwhelming majority of the Nation's wholesale distributors belong to the PMAA's federated State and regional associations.

The critically important issue raised by Texaco's petition in this case is whether a claim of unlawful price discrimination under the Robinson-Patman Act[2] can be maintained by retailers against a manufacturer of petroleum products because the manufacturer sells to its wholesalers at a lower price than it charges retailers. According to the lower court, the disparities in prices traditionally charged to petroleum wholesalers and retailers are *prima facie* evidence of illegal price discrimination if they are not deemed justified by the wholesaler's costs and if some portion of the wholesaler's price advantage is passed through to its retail customers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1039 (9th Cir. 1988). In short, refiners such as Texaco will be subjected to a substantially increased risk of antitrust liability whenever functional discounts are offered to wholesalers, thus threatening the existence of the discounts themselves.

Wholesale distributors, of course, resell the products they purchase to independent retailers and they cannot perform their marketing function if they are required to purchase petroleum products at the same prices that are offered to their retailer customers and their customers' competitors. Thus, while the instant controversy concerns a manufacturer and a

[2] 15 U.S.C. Section 13(a).

retailer, its ultimate resolution will most profoundly impact on the ability of wholesale distributors to remain a competitive force in the petroleum industry.[3]

This Court will hear the views of the petitioner, a manufacturer of petroleum products, and the respondents, who are retail service station dealers. The PMAA seeks leave to file the accompanying *amicus curiae* brief in order to provide the perspective of the one group, wholesale distributors, who will be most profoundly affected if the decision below is allowed to stand.

CONCLUSION

The PMAA's motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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[3] If the decision is allowed to stand, manufacturers of petroleum products will adapt to the lower court's ruling by adjusting their pricing policies in one of the following ways: (1) by eliminating wholesale discounts; (2) by prohibiting wholesale distributors from passing through all or a portion of the discount; or (3) by regulating the level of passthrough based upon calculations as to the "value" of the distributional services performed by the wholesale customer. Any one of these alternatives would have extraordinary consequences for wholesale distributors and the competition that they bring to the petroleum industry.

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BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of the brief filed by Texaco, Inc. in this case.

INTEREST OF *AMICUS CURIAE*

The PMAA is a federation of 43 State and regional trade associations representing over ten thousand small business petroleum marketers.[1] Together, PMAA members market ap-

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[1] A list of the constituent State and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

proximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply roughly two-thirds of the Nation's retail motor fuel facilities,[2] approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets. Historically, refiners have chosen to market a large percentage of their products through independent marketers because the Nation's vast petroleum supply network requires capital and manpower expenditures greater than the resources of even the largest corporate entity.

The PMAA's interest in this case is direct and substantial. At issue is a decision of the Ninth Circuit Court of Appeals[3] that impacts on the ability of refiners and other suppliers of petroleum products to offer functional discounts to their wholesale distributors. Wholesale distributors, of course, resell the products they purchase to independent retailers, a function that cannot be performed if they are required to purchase petroleum at the same prices that are offered to their customers and to their customers' competitors. Without functional discounts, wholesalers would be unable to remain a competitive force in the petroleum industry.

The Ninth Circuit's decision in this case risks the elimination of functional discounts in dual distribution areas, where

[2] Independent marketers own or lease over 58,000 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1986 member survey discloses that its members supplied 97,871 of America's approximately 150,000 retail motor fuel distribution outlets (e.g., gasoline stations, truck stops, convenience stores, etc.). Their 230,000 employees service this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximaely $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

[3] *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

refiners' direct sales to retail dealers overlap with those of their branded distributors. These dual distribution or overlap areas are becoming substantially more prevalent in the petroleum industry, and they exhibit an intense price rivalry. While at one time, refiners' direct marketing operations were confined to more densely populated areas, with wholesalers occupying a niche in less concentrated areas where direct marketing is generally not cost-effective, demographic shifts have altered this pattern significantly. The expansion of direct marketing operations by refiner-suppliers has mirrored the expansion of metropolitan areas into what was once exclusively wholesaler territory, thus placing refiners in competition with their branded distributors. If functional discounts are eliminated in these areas, wholesalers would be unable to supply their customers at prices that are competitive with the prices charged by refiners to direct buying retailers.

For the reasons that follow, the Ninth Circuit's decision risks the elimination of functional or wholesale discounts and the establishment of a system of refiner price regulation that can only lead to higher prices and less competition at the wholesale and retail levels.

ARGUMENT

The Robinson-Patman Act was enacted by Congress at the behest of certain retailers who feared the competitive advantages that chain stores and other big buyers could secure solely because they purchased in large quantities. As is clear from the legislative history of the Act, the concern of Congress focused on the ability of large buyers to exact discounts from their suppliers because of their quantity purchasing ability, and a perceived harm to competition from the elimination of other buyers who were unable to secure the same advantage. *F.T.C. v. Morton Salt*, 334 U.S. 37, 43 (1948); *Falls City*

Industries Inc. v. Vanco Beverages Inc., 460 U.S. 428, 436 (1983); Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-23 (1962).

Consistent with the purposes of the Act, this Court recognized an inference of harm to competition in circumstances representing the paradigm setting envisioned by Congress, that is, where a substantial price disparity exists among competing purchasers operating at the same level of trade and where the price differences are unrelated to the functions they perform. As first recognized in *Morton Salt*, and later applied in *Falls City*, the so-called "self-evident" inference of competitive injury is derived from the lack of any apparent justification for the price difference other than the favoritism that was the focus of the Act.

At issue in this case is the application of the *Morton Salt* inference in an entirely different setting and one that does not easily lend itself to mechanical applications of antitrust principles. Here, antitrust injury was inferred from price disparities existing among purchasers at different levels of trade, where the price differences resulted from the functional discounts normally given to petroleum wholesalers who supply retail service station dealers. The application of the inference to functional discounts, which have heretofore maintained an uncertain status in the law,[4] has never been considered by this Court.

As will be developed more fully below, harm to competition is not easily inferred from circumstances where an apparent justification exists for the price difference, such as where it reflects the different functions performed by wholesalers and retailers at different levels of trade. Where, as here,

[4] See, Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 543-44 (1976). *See also, e.g.*, *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65-74 (1953).

favoritism is not self-evident from the price differences at issue, the entire factual context should be examined to determine whether the requisite harm to competition is present. Yet the Ninth Circuit failed to credibly examine the contextual circumstances, focusing instead on whether the functional discount is justified by the costs associated with the wholesaler's function. Rather than examining direct evidence of harm to competition, it sanctioned an inference of competitive injury when wholesalers pass through their discounts to retail customers and where the discount is deemed to exceed the wholesaler's costs.

This mechanical extension of the *Morton Salt* inference to circumstances for which it was not originally intended has led the Ninth Circuit to a result that is at odds with the purposes of the Robinson-Patman Act. By imposing antitrust liability on suppliers for the independent pricing determinations of their wholesale distributors, the lower court has invited the establishment of a cumbersome cost-based pricing system that is unresponsive to a free play of competitive forces. That the imposition of such a system is not justified in the circumstances of this case is apparent from the anticompetitive impact it will have on the petroleum industry.

I. Functional Discounts Are Part of The Normal Functioning Of A Highly Competitive Industry

It has long been a hallmark of the petroleum industry that businesses operating at higher functional levels are subject to pricing policies that are significantly different from those that suppliers implement further down the chain of distribution. That wholesalers receive price advantages not generally available to retail service station dealers is both necessary to the continued existence of wholesalers and to the maintenance of

a distribution system that is characterized by intense competition at the wholesale and retail levels.

Wholesale distributors are generally supplied with petroleum products by large refiners and they resell the products to independent service station dealers. For the most part, they are engaged in providing services that would normally be provided by their refiner-suppliers had the supplier opted in favor of a direct marketing operation. In many cases, these services include the maintenance of inventories, product delivery, product promotion, assisting retail dealers in becoming effective marketers, investing in equipment and making service station properties available to retail dealers. The costs associated with these services, of course, are borne by the distributor and they reduce the capital burdens of the supplier.

While the services performed by wholesalers differ from distributor to distributor, from customer to customer and from market to market, all wholesalers are confronted with a substantial entrepreneurial risk. Such risks are assumed by wholesalers when they extend credit to their customers, when they incur debt and when they contract to provide a constant source of supply to their customers irrespective of market conditions. Moreover, because their contracts with suppliers require minimum purchases of motor fuels and other petroleum products, wholesalers also assume the risk that their sales volumes will be sufficient to cover the quantities of products they are obliged to purchase. The assumption of these risks by wholesalers normally results in a substantial lessening of the market risks assumed by suppliers — a fact not lost on such suppliers when they offer functional discounts.

In areas where they market, wholesale distributors can exist only when the prices at which they purchase petroleum products enable them to resell at a profit, after incurring the costs associated with the distributional services they perform,

the investments they make and the risks they assume. In short, wholesalers could not exist without functional discounts; they could not remain in business if they were required to purchase petroleum products at the same prices that are offered to the independent service station dealers whom they are in the business of supplying.

Petroleum suppliers are also required to offer functional discounts if they are to maintain an effective market presence in areas where it is not cost-effective to market directly, or in direct marketing areas, where capital investments are to be minimized. By offering functional discounts to attract wholesale distributors, a major refiner can maintain its brand in a particular local market without incurring the expenses of investing its capital in marketing facilities.

The synergies created by this relationship among petroleum suppliers and wholesalers, built upon the existence of functional discounts, can be observed in virtually any market setting. In those less concentrated areas where it is not cost-effective for refiners to maintain direct marketing operations, wholesale distributors bring efficiencies and competition that would not otherwise be present. As the U.S. Department of Energy ("DOE") observed after a review of refiner marketing strategies, ". . . jobbers are more efficient and better positioned to distribute in more widely disbursed areas where distribution costs tend to be relatively high for refiners."[5] And in so-called "dual distribution areas," where sales by refiners overlap with those of their branded distributors, wholesalers provide an additional presence in the market and additional competition. As the DOE concluded, "these overlap areas exhibit intense price rivalry . . . [as] a result, . . . tl · competitive

[5] U.S. Department of Energy, Deregulated Gasoline Marketing, *Consequences for Competition, Competitors, and Consumers*, DOE/CP-0007 (1984) at 43.

process is working vigorously in these areas with the consumer the utilimate beneficiary."[6]

Thus, functional discounts are part of the normal functioning of a highly competitive industry. They are pervasive; they exist in virtually every market setting and the only inference that may be drawn from the disparate prices charged to wholesalers and retailers is that the system is functioning normally. As shown below, these price differences do not give rise to an inference of illegal price discrimination; in such circumstances, illegal price discrimination must be proven with direct evidence of harm to competition.

II. Illegal Price Discrimination Cannot Be Inferred From The Disparate Prices Suppliers Charge Wholesalers and Retailers

A. Under the Robinson-Patman Act, Illegal Price Discrimination May Be Inferred From Substantial Price Disparities Only When The Customers Subject To Such Price Differences Are Not Functionally Different

The Robinson-Patman Act was aimed at protecting small retail businesses against favoritism toward their larger competitors and its objective was the elimination of the competitive advantage a large buyer could secure solely because of its quantity purchasing ability. *F.T.C. v. Morton Salt*, 334 U.S. at 43. The focus of the Act was the quantity discount to large buyers and the inability of other buyers, at the same level of distribution, to secure the same discount so long as they performed the same function.

In *Morton Salt*, for example, this Court was confronted with a salt manufacturer's discount pricing system under which only

[6] *Id.* at 126 n. 2.

the five largest retail grocery chains in the country were able to buy enough salt to qualify for the manufacturer's most lucrative discount. This was the classic Robinson-Patman case aimed at the very type of price discrimination the Act was designed to prevent, namely, a system that discriminates among competing buyers simply by virtue of their size. Because there were no functional differences among the favored and disfavored buyers in *Morton Salt*, it was obvious to this Court that the longstanding and substantial price disparity was proof of the evil that Robinson-Patman was aimed at preventing. Hence the so-called "self-evident" inference of competitive injury.[7]

Where there are no functional differences between competing purchasers, substantial price disparities give rise to an inference of illegal price discrimination because there is no apparent justification for the price difference other than the favoritism that prompted Congress to enact Robinson-Patman. Thus, under the doctrine set forth in *Morton Salt*, the burden rests with the manufacturer to justify the discount "based on his actual savings and costs." *Morton Salt*, 334 U.S. at 48.

Where there are functional differences between buyers, however, price differences are to be expected. In the petroleum industry, for example, price disparities among wholesalers and retail dealers are part of the normal functioning of the system; a rationale for the price difference is apparent from the different levels of trade at which the wholesalers and retailers operate. There is nothing "obvious" or "self-evident" from which to infer that the price disparities result from the favoritism that prompted Congress to enact

[7] In the circumstances of *Morton Salt*, this Court found a basis for the inference of illegal price discrimination in "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47.

Robinson-Patman. If anything, the inference should be just the opposite, that is, an inference that price disparities between non-competing wholesalers and retailers are deemed justified on a functional basis in the absence of direct evidence of harm to competition.

Unlike *Morton Salt* and *Falls City*, the price discrimination at issue in this case was not the result of quantity or regional discounts applied to purchasers at the same level of trade. Nor was it rooted in any favoritism for an elite group of Texaco's largest customers; indeed, there is no dispute that the wholesale discounts at issue were made available to all wholesalers, irrespective of size. Yet the Court below treated the price disparities as an anomaly justifying an inference of illegal price discrimination, rather than as a normal attribute of petroleum distribution.

The Ninth Circuit's construction of *Morton Salt*, and its application of the "self-evident inference" to the circumstances presented here, is not a construction that this Court has ever adopted. While the court below purported to root its application in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), its reliance on *Perkins* is misplaced. It cited *Perkins* for the proposition that substantial price disparities between wholesalers and retailers of petroleum products give rise to the same inference of illegal price discrimination as do price disparities that exist between purchasers at the same level of trade, so long as the wholesaler passes on a portion of its discount to its retail customers. Yet in *Perkins* the favored and disfavored buyers were dual distributors operating at both the wholesale and retail levels.[8] Functionally, there was no difference between the favored and disfavored buyers; both of them purchased gasoline from Standard and resold the product at their own directly operated stations.

[8] The disfavored buyer, Perkins, "was both a wholesaler, operating storage plants and trucking equipment, and a retailer through his own Perkins stations." 395 U.S. at 644. The favored buyer, Signal Oil & Gas Co., was the parent of vertically integrated subsidiaries, one of which operated a chain of retail service stations. *Id.* at 645. In essence, this Court found that Signal, and not its retail subsidiary, was the "customer" that competed with Perkins. *Id.* at 647.

Unlike the situation present here, *Perkins* has all of the elements of a paradigmatic Robinson-Patman case. Because Signal furnished Standard with part of its vital supply of crude petroleum, it was able to insist upon a lower price than was offered to its competitor, Perkins, who performed the same marketing functions. *Id.* at 647. The root of the controversy was the favoritism shown to one buyer over its competitor based upon factors that are unrelated to the functions they performed. As was the case in *Morton Salt*, illegal price discrimination was "self-evident" and inferred from the price disparities that resulted from the favoritism shown to Signal.

Thus, it is only when no apparent justification for the price disparity exists that harm to competition may be inferred. Where, as here, the disparate prices are charged to customers at different levels of trade, the only "self-evident" inference to be drawn is that the system is functioning in a rational manner; a violation of § 2(a) can be established, therefore, solely through direct evidence of harm to competition.

B. The Lower Court Erred In Extending The Reach Of The Self-Evident Inference To Functionally Different Purchasers Through A Cost-Based Approach

While the Ninth Circuit acknowledged that wholesale or functional discounts offered equally to all wholesale distributors will not normally constitute illegal price discrimination, it held that injury to competition is "self-evident" in the *Morton Salt* sense whenever the price differentials between wholesale and retail customers: (1) exceed "the value of the services [a wholesale distributor] perform[s];" and (2) the discount is

passed through, in whole or in part, to the wholesaler's retail customers. 842 F.2d at 1039. This extension of the "self-evident" inference to sales occurring at different levels of trade has no solid grounding in antitrust law and is fraught with potentially disastrous practical consequences for wholesalers.

The rationale for the lower court's extension of the inference is set forth in its opinion:

> "Where, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, the seller cannot claim immunity from Robinson-Patman liability. In such situations, the connection between the seller's price discrimination and the adverse effect on competition is *obvious and foreseeable* and a plaintiff may assert a cause of action against the seller even though he and the favored customer operate at different market levels. *See Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951)." (emphasis added)

842 F.2d at 1040.

For the reasons stated below, the logic of this holding is seriously flawed; when viewed from a market perspective, it is not only counterintuitive, but the rules that flow naturally from it are unworkable in the petroleum industry.

The lower court, of course, is correct when it states that a seller cannot always claim immunity from Robinson-Patman liability for the downstream effects of its pricing policies. It is quite wrong, however, to state that harm to competition is "obvious and foreseeable" whenever the functional discount granted a wholesaler exceeds the costs of its function. To begin with, functional discounts virtually always exceed the cost of

a wholesaler's function in dual distribution areas; were it not so, wholesalers would find it exceedingly difficult to earn a profit.[9] Moreover, it is not the size of the discount that impacts competition, it is the amount of it that is passed through in a wholesaler's price to retailers. Whether a wholesaler will pass through a portion of its discount, however, and the amount of the passthrough, are not often "obvious" to suppliers. And whenever a wholesaler passes through a portion of its discount — a portion that could as easily be applied to earnings — it is usually animated by the competitive forces of the marketplace. To assume otherwise would be to attribute to the wholesaler a desire to forego profits, without market justification.

While functional discounts may not always enhance competition, it would be wrong to assume — as the lower court did here — that the "obvious and foreseeable" effect of such passthroughs is anticompetitive. And it would be just as wrong to assume that the natural and foreseeable consequence of the Ninth Circuit's decision — supplier price regulation — is workable within the petroleum industry or that it will further the objectives of the Robinson-Patman Act.

Under the court of appeals decision, refiners risk liability whenever their wholesale customers decide to pass on a portion of a wholesale discount to retailers. Thus, any refiner offering wholesale discounts risks running afoul of § 2(a) of the Robinson-Patman Act unless it: (1) stops offering wholesale discounts; (2) prohibits its wholesale customers from passing through all or a portion of the discount; or (3) regulates the

[9] The wholesale discount is, in effect, the wholesaler's gross margin and it contains some element of profit. If wholesale distributors were required to purchase petroleum products at the same prices that are available to direct-buying retail dealers, with an allowance only for the precise amount of the wholesaler's costs, they would either have to forego a profit or resell the product to their own retail dealer customers at uncompetitive prices.

level of passthrough based upon precise calculations as to the "value" of the distributional services performed by the wholesaler. Any one of these alternatives would have extraordinary consequences for the petroleum industry.

The consequences for wholesale distributors of losing their discounts are obvious; if they purchase petroleum products at the same prices that are available to direct-buying retail dealers, they would be unable to resell the product to their own retail dealer customers at competitive prices. The same would be true if they were prohibited from passing through any portion of their discounts to retail customers. Were that the case, there would be no incentive to practice the efficiencies that make such passthroughs possible.[10] Moreover, to the extent that a wholesale distributor and its refiner-supplier cooperate in a scheme to regulate passthroughs, they would be exposed to resale price maintenance claims under Section 1 of the Sherman Act.[11]

Finally, no refiner-supplier can be expected to incur the massive administrative burden associated with justifying each functional discount on a cost-savings basis. The refiner-supplier would be required to know the number of days the product was stored by the distributor prior to resale, whether credit was extended upon resale and the credit risk, whether the wholesaler employed a salesman in the transaction, the costs associated with delivery of the product by the wholesale distributor to its own customer, whether promotional costs were incurred and the *pro rata* portion of all of the other fixed and variable costs associated with marketing a certain volume of product in a particular market. It would also be required

[10] In many cases, the incentive animating wholesalers to achieve efficiencies and market at the lowest practical price is to increase market share.

[11] 15 U.S.C. § 1. The longstanding recognition of price maintenance as a Sherman Act violation is reflected in this Court's opinion in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

to place a "value" on certain intangible services provided by the wholesaler, such as the assistance provided retail dealers in becoming effective marketers. These costs vary from distributor to distributor and from time to time and are impossible to calculate with any degree of precision.[12]

The cost-based approach adopted by the court below, therefore, does not enhance the objectives of the Robinson-Patman Act. As is apparent from its application here, it is capable of supporting an unjustified inference of illegal price discrimination and a finding of Robinson-Patman liability in the absence of direct evidence of harm to competition. If it becomes an established precedent, moreover, it will signal the demise of at least those wholesale distributors in overlap areas, whose presence in the distribution system can no longer be justified if refiner-suppliers are exposed to antitrust liability for the independent pricing determinations of their wholesale distributors. As such, it can only lead to higher prices and less competition at the wholesale and retail levels.

III. Reliance Upon the "Self-Evident" Inference Was Especially Inappropriate In This Case Because Of The Absence Of Direct Evidence Of Harm To Competition.

In considering the requisite harm to competition, the lower court relied almost exclusively on the "self-evident" inference to support its holding. What the Ninth Circuit characterized as "considerable specific evidence" of an adverse effect on competition[13] was comprised of a few displaced sales and lost

[12] In determining that the discounts involved here were not cost-based, the Ninth Circuit cited the district court's observation that "Texaco made 'no serious attempt' to provide a quantitative justification for its functional discount, instead 'merely identifying some of the functions' that Dompier and Gull were said to have performed." 842 F.2d at 1039.

[13] 842 F.2d at 1041.

profits by some of the plaintiffs, hardly the sort of evidence that would establish an appreciable impact on the market. 842 F.2d at 1041 and 1042-43. There was no real market analysis nor any consideration of whether the major factors driving the Spokane market were the cause of plaintiffs' apparent misfortune. Indeed, there was no discussion by the lower court of whether competition in the Spokane market was in fact thriving.[14]

In reality, the direct evidence relied upon by the lower court as a supplement to the "self-evident" inference focused exclusively on harm to the plaintiffs. It focused on a infinitesimal segment of the market and it attempted to justify its narrow focus with the maxim that "injury to competitors may be probative of harm to competition." 842 F.2d at 1040. Yet injury to competitors alone — especially when such competitors comprise a mere handful of those that exist in the market — is not enough to establish a *prima facie* case of injury to competition.[15] While Section 2(a) is satisfied by a showing of a reasonable possibility that a price difference *may* harm competition, "that principle does not justify abdication of the duty to consider evidence that a 'reasonable possibility' of harm does not, in fact, exist in the particular industry." *Boise Cascade Corporation v. FTC*, 837 F.2d 1127, 1146 (D.C. Cir. 1988).

[14] As Texaco points out at p. 5 of its petition for certiorari, "Texaco was just one of many gasoline sellers in Spokane and, concededly, competitive intensity increased over the 1972-81 period. (ER 165, 178, 236-41, 288-89, 295-96, 334). Plaintiffs acknowledged that their businesses were injured by, among other things, entrance into the market of new, high-volume self-serve or mini-serve stations (ER 186B, 230, 303-08), the advent of higher mileage-per-gallon automobiles (ER 402), and entrance into the market of well-known entities, such as Sears or Midas Mufflers (ER 403A-03B)."

[15] This Court's admonition in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) that the antitrust laws were enacted for "the protection of competition, not competitors," was dismissed by the court below as an "oft-quoted chestnut" that is regularly misconstrued by antitrust defendants. 842 F.2d at 1040.

In short, there was no consideration by the lower court of whether the lower prices engendered by the functional discounts worked their way to consumers and whether, on the whole, they had a positive effect on competition in the marketplace. It appears that the lower court was concerned solely with enhancing certain fairness goals, which it considered violated when competing retailers were charged different prices for goods of like grade and quality. But by equating harm to competition with harm to the plaintiffs, and by ignoring the competitive condition of the market in which the alleged violations were said to have occurred, the lower court fashioned what is in effect a *per se* rule of illegality. Harm to competition is conclusively presumed irrespective of whether the impact of the price disparities at issue are of a sort to be regulated by the Robinson-Patman Act. It is precisely this type of doctrinaire application that places Robinson-Patman "in hopeless and complete conflict with other antitrust laws," *Boise Cascade Corp. v. F.T.C.*, 837 F.2d at 1149 (Williams, Cir. J. concurring), a result that cannot be countenanced by this Court in light of its repeated admonitions that such conflicts are to be avoided.

CONCLUSION

The decision of the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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August 4, 1989

APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oilmen's Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Northwest Petroleum Association
Ohio Petroleum Marketers Association

Oklahoma Oil Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.
Petroleum Marketers of Iowa
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Western Petroleum Marketers Association
Wyoming Petroleum Marketers Association